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Cedar Surgery v. Sherry Bonelli : Reply Brief of Appellant

Utah Supreme Court

Randall C. Allen; Jensen, Graff and Barnes, LLP; Attorney for Plaintiff/Appellant.
Michael D. Hughes; Hughes and Bursell, PC; Aaron D. Randall; Attorneys for Defendants/ Appellees.

IN THE UTAH SUPREME COURT

CEDAR SURGERY CENTER, L.L.C., Plaintiff and Appellant, v. SHERRY BONELLI, and BONELLI & ASSOCIATES, Defendants and Appellees.	**REPLY BRIEF OF CEDAR SURGERY CENTER, L.L.C.** Supreme Court Case No. 20020718-SC

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT, IRON COUNTY, TRIAL COURT NO. 010500654, HONORABLE J. PHILIP EVES, DISTRICT JUDGE

Michael D. Hughes
HUGHES & BURSELL, P.C.
187 North 100 West
St. George, Utah 84770
(Attorneys for Defendants and Appellees)

Randall C. Allen
JENSEN, GRAFF & BARNES, LLP
P.O. Box 726
250 S. Main
Cedar City, Utah 84720
(Attorneys for Plaintiff and Appellant)

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JENSEN, GRAFF & BARNES, LLP
P.O. Box 726
250 S. Main
Cedar City, Utah 84720
(Attorneys for Plaintiff and Appellant)

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ARGUMENT

I. IF DEFENDANTS-APPELLEES WIN THIS APPEALS CASE, THEN FUTURE DEFENDANTS WILL NOT NEED TO RESPOND TO PERSONALLY SERVED SUMMONSES OR NOTICES OF HEARING ON DEFAULT JUDGMENT, AND MAY WAIT UNTIL AFTER JUDGMENT IS ISSUED AGAINST THEM, EVEN WHERE THEY HAVE NO EXCUSABLE NEGLECT, AND THEN SIMPLY MOVE TO SET ASIDE – A RULE OF LAW WHICH WOULD CLEARLY CONTRADICT THE MEANING AND INTENT OF THE *CHANDLER* WAIVABILITY STANDARD.

If the Defendants-Appellees are allowed to have this judgment set aside, then the rule of law will become such that any defendant can simply ignore personally served summons, ignore notices of hearing on default judgment, and ignore the entire judicial process, and then at some point after default judgment is entered, i.e. when any collection effort is made, they will be able to simply file a motion to set aside, not even based upon excusable neglect, and get the judgment set aside. Clearly, this would be the end of the *Chandler* rule that arbitration clauses are waivable, *see Chandler v. Blue Cross Blue Shield*, 833 P.2d 356 (Utah 1992), and indeed would incentivise defendants to do nothing in response to summons – why do anything at all when a motion to set aside is available in the end game? This is contrary to the established rule of law, namely the *Chandler* rule, that defendants who do not assert the defense of arbitability waive that right. *See id.*

II. THE POINT OF THE *SUBSTANTIAL PARTICIPATION* RULE IS TO EXCUSE DEFENDANTS WHO DO NOT IMMEDIATELY RAISE ARBITRATION, BUT WHO DO SO BEFORE SUBSTANTIALLY PARTICIPATING IN THE LITIGATION.

THE *SUBSTANTIAL PARTICIPATION* RULE SHOULD NOT BE MISUSED TO JUSTIFY A DEFENDANT WHO NEVER APPEARS AND DEFENDS ITSELF AT ALL, NEVER RAISES ARBITRATION, IGNORES A PERSONALLY SERVED SUMMONS AND THE HEARING ON DEFAULT JUDGMENT AND ALLOWS DEFAULT JUDGMENT TO BE ENTERED AGAINST IT WITHOUT EXCUSABLE NEGLECT.

Chandler's *substantial participation* rule allows Courts to order arbitration even where a defendant fails to raise arbitration right away, e.g. in its answer, but nonetheless does so during the litigation, prior to substantially participating therein. Defendants-Appellees would have this court misuse and misapply this rule to excuse a defendant who ignores personal service, fails to respond, fails to attend the hearing on default judgment, and does nothing until after judgment has been entered against him – a fact pattern wholly foreign to the facts in *Chandler*, and categorically different; defendants should be required to raise arbitration or else be found to have waived it – this is the fundamental holding of *Chandler*; to ignore legal proceedings and only raise the issue after final judgment, and to nonetheless be allowed under a manipulation of the *substantial participation* rule, to toss out everything that occurred until the motion to set aside was belatedly made, would be to vitiate the fundamental waiver rule. Furthermore, it would elevate defaulters – indeed defaulters with no excusable neglect basis for a set aside motion – above those who respond to the suit and yet raise the arbitration defense late in that litigation, rewarding the defendant that wholly ignored the litigation with a set aside and penalizing the defendant that responded to the summons and appeared and defended themselves.

In other words, people that acted late in the game would be penalized while those that acted only after the game was over would be rewarded. The wavier and *substantial participation*

rules would thus become irrational and internally inconsistent. Such a proposed legal scheme should be rejected.

III. IF DEFAULTERS ARE TO BE ALLOWED TO AVOID THE WAVIER RULE AND THUS TO RAISE ARBITRATION FOR THE FIRST TIME IN A SET ASIDE MOTION, IT SHOULD BE LIMITED TO THOSE WHO ALSO BASE THEIR SET ASIDE MOTION ON EXCUSABLE NEGLECT.

Perhaps defaulters who defaulted because of excusable neglect should be able to have the judgment set aside and thus to raise arbitration. ***But that is not this case.*** This case is one in which the defendants moved to set aside solely on the basis of arbitration, and ***not*** on the basis of excusable neglect. Such defendants fairly and justly come within the *Chandler* waiver rule – they failed to raise arbitration in the litigation, and the litigation was concluded while they chose to sit in default. There is no unfairness in enforcing the waiver rule in this case, and indeed, as argued above, failing to enforce the waiver rule in this case would leave a waiver rule which would be either wholly vitiated or else rendered completely irrational as it applied defaulting defendants versus defendants who appear and defend and belatedly assert arbitration.

IV. LEGAL STANDARDS RATHER THAN FACTUAL FINDINGS ARE IN QUESTION, THUS THE PROPER STANDARD OF REVIEW IS *DE NOVO.*

Appellant is not asking this court to review determinations of facts. Indeed there are no facts in dispute. Rather, appellant is asking this Court only to review the appropriate application of the legal standard for determining waiver of contractual arbitration rights where a party, personally served, has defaulted and failed to appear and defend itself at a hearing or in response to plaintiff's affidavits submitted thereafter, and allows default judgment to be entered, and only then moves to set aside – not based upon excusable neglect, but merely upon the basis of a belated, post-judgment invocation of a contractual arbitration clause. Again, the facts are not in

dispute; the question is legal in nature: whether a party under these undisputed facts has waived its contractual arbitration right under *Chandler v. Blue Cross Blue Shield*, 833 P.2d 356 (Utah 1992). Thus the operative standard in this matter is *de novo*. *See Pledger v. Gillespie*, 982 P.2d 356, 360 (Utah 1992).

Even if the standard is *abuse of discretion*, the arguments set forth above clearly establish that the only logical and consistent application and rule of law for the waiver standard to govern arbitration motions is one under which defaulters, who were personally served and who failed to raise excusable neglect, are to be held to have waived arbitration.

V. VAGUE ACCUSATIONS OF INEQUITABLE CONDUCT ARE NOT WELL TAKEN IN THIS CASE AND DO NOT PERTAIN TO THE ISSUES ON APPEAL. REGARDLESS, PLAINTIFF-APPELLANT HAS CONDUCTED ITSELF IN ACCORDANCE WITH EQUITABLE STANDARDS.

Defendants-Appellees argue that Plaintiff-Appellant's arguments should not prevail because of equity. Such a "clean hands" argument is inapposite in this case; this case presents questions as to the proper standard for determining whether a defendant should be allowed to raise an arbitration clause for the first time in a set aside motion based not upon excusable neglect but rather only on the existence of a contractual arbitration clause. Furthermore, and regardless of Defendants-Appellees' invoking of equitable issues, Plaintiff-Appellant has acted equitably and ethically in this matter; it personally served Defendants, held a hearing on the propriety of default judgment, submitted affidavits regarding that propriety, and secured a judgment from the court. These actions comport wholly with equitable conduct and provide no basis for any kind of "clean hands" argument, even if such argument were relevant.

VI. THIS COURT HAS JURISDICTION OVER THIS APPEAL.

The district court's order which is appealed herein was not a final order. This Court already considered Defendants-Appellee's arguments to the contrary as they were asserted in opposition to Plaintiff-Appellant's Petition for Leave to file an Interlocutory Appeal, prior to this Court's granting of leave to file this interlocutory appeal. The simple but fatal flaw in Defendants-Appellees' repeat argument on this point is the truth that the district court's order merely sets aside the judgment and orders the parties to arbitrate; ***it did not dismiss the case.*** The order, which is set forth in the Addendum to Plaintiff-Appellant's opening brief, speaks for itself in this regard, and plainly does **not** do what Defendants-Appellees' jurisdictional argument claims it does (i.e. enter a final order dismissing the case).

VII. PREJUDICE IN SETTING ASIDE THE JUDGMENT IS CLEAR.

The setting aside of the default judgment clearly prejudices Plaintiff-Appellant. As it stood prior to the granting of the set aside motion, Plaintiff-Appellant possessed a sizable judgment against Defendants-Appellees, awarding it damages for Defendants-Appellees' breaches of contract. Upon the granting of the set aside motion, Plaintiff-Appellant is set back to square one, has no judgment, and must start over in the pursuit of this matter. This constitutes prejudice. Furthermore, this was not a simple default process. Plaintiffs first went to the effort and expense of having Defendants personally served in California. They then submitted default pleadings, and the Court asked for a hearing, which Plaintiff attended and participated in, while Defendants did not. The Court then had Plaintiffs submit affidavits to further support its petition for default judgment. Only after having effectuated personal service, submitting default pleadings, participating in the hearing, and preparing and filing the additional affidavits, did the Court grant

default judgment. All the effort and expense of these actions would be rendered meaningless and wasted if the granting of the motion to set aside stands – this is additional prejudice to Plaintiff-Appellant.

Indeed, if Defendants-Appellees were able to secure affirmation of the set aside order below in this case, based upon the prejudice issue, then indeed ***no*** plaintiff in the same setting would likely be able to establish prejudice. In a default setting such as this – where the defendant has been personally served, ignored the summons, ignored the hearing, ignored the process, and moved only after judgment for set aside based only upon a never-before raised arbitration clause – there is little if anything else that a plaintiff could have invested into the process so as to constitute additional lost and wasted efforts constituting prejudice. Such a plaintiff has put forth everything he could be required to put forth in a default setting: fulfillment of personal service requirements, the holding of the hearing, the submission of additional affidavits, and the submission and securing of the default judgment. No additional efforts could be expended and thus wasted, and nothing more could be done and thus lost, so as to have a case with an increased level of prejudice. If Defendants-Appellee's argument that there is no prejudice here is to be adopted and the order below affirmed based thereon, then the issue of waiver of arbitration in settings such as this becomes moot, since the such a prejudice standard would be essentially unattainable. The more rational and logical ruling is to find prejudice in the loss of the judgment and in the wasted time effort and expense of the process required to secure such judgment, and thereby to follow-through with the waiver rule as should be substantively applied in this case. When a defendant has chosen to ignore personal service, chosen to ignore the hearing set to consider default judgment, allowed the process as it continue forward thereafter, and allowed default judgment to be entered against it, and ***only thereafter*** appeared and moved to set aside ***not*** based on excusable

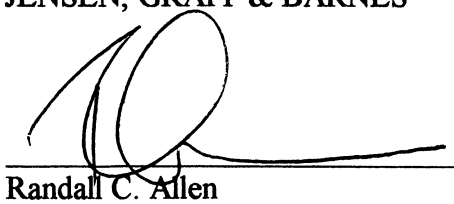
neglect but ***only*** **based upon a never-before raised nor asserted contractual arbitration clause**, such a defendant should be held to have waived its arbitration right.

CONCLUSION

Wherefore Plaintiff-Appellant asks the Court to reverse the district court's order setting aside the judgment and ordering arbitration, thereby upholding a consistent and internally logical waiver standard under *Chandler* and requiring defendants (who lack excusable neglect) to appear and raise arbitration during the pendency of the litigation, and thereby rejecting the belated (and unexcused by neglect) raising of arbitration rights by defendants who ignore personal summonses, ignore default hearings, and ignore the process leading to the court's entry of default judgment against them.

Dated this 7th day of July, 2003,

JENSEN, GRAFF & BARNES



Randall C. Allen

CERTIFICATE OF SERVICE

I hereby certify that on this the 7th day of July, 2003, I did cause two copies of the foregoing to be mailed by US mail, first class postage prepaid, to the following:

Michael D. Hughes
HUGHES & BURSELL, P.C.
187 North 100 West
St. George, Utah 84770